

SERVED: May 27, 1992

NTSB Order No. EA-3560

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 30th day of April, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

JOHN W. TROTTER
and CHRIS R. KERN,

Respondents.

Dockets SE-9873
SE-9874

OPINION AND ORDER

This case involves an appeal by respondent Trotter from an initial decision of Administrative Law Judge William E. Fowler, issued orally at the conclusion of an evidentiary hearing held on November 7, 1989.¹ By that decision, the law judge affirmed the

¹An excerpt from the transcript containing the initial decision is attached. The Administrator initially proceeded with certificate actions against both respondents identified above--on the flight in question Trotter acted as pilot-in-command and Kern acted as first officer--and the law judge affirmed both actions in his initial decision. After notices of appeal were filed by
(continued...)

Administrator's determination that respondent had violated sections 91.75(a), 91.121 and 91.9 of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91) during a passenger carrying flight bound for Miami, Florida, on October 27, 1987.² In addition, he sustained a 30-day suspension of respondent's airline transport pilot (ATP) certificate, which had been ordered by the Administrator for such alleged FAR violations.

The Administrator's charges arose from an incident in which respondent, who was serving as pilot-in-command of Continental Flight 483 and was operating flight communications at the time,

¹(...continued)
each respondent, the Administrator withdrew his complaint against respondent Kern. As the sole action now pending before the Board is the certificate action against respondent Trotter, he will be referred to as "respondent" in the remainder of this opinion and order.

²The pertinent FAR provisions, now recodified at 14 C.F.R. §§ 91.123(a), 91.179 and 91.13(a), respectively, read as follows:

"§ 91.75 Compliance with ATC clearances and instructions.

(a) When an ATC [air traffic control] clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless he obtains an amended clearance. However, except in positive controlled airspace, this paragraph does not prohibit him from canceling an IFR [instrument flight rules] flight plan if he is operating in VFR [visual flight rules] weather conditions. If a pilot is uncertain of the meaning of an ATC clearance, he shall immediately request clarification from ATC.

§ 91.121 IFR cruising altitude or flight level.

(a) In controlled airspace. Each person operating an aircraft under IFR in level cruising flight in controlled airspace shall maintain the altitude or flight level assigned that aircraft by ATC.

* * * * *

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

mistakenly believed that a clearance to an altitude of 3,000 feet, which had been given to Eastern Flight 53, was intended for him. As a result, he had his aircraft descend from 10,000 feet (his assigned altitude) to approximately 8,000 feet before corrective action was commenced by ATC. In the interim, a breach of minimum separation standards between respondent's aircraft and a third aircraft occurred.³

In his appeal brief, respondent asserts that he exercised due care in determining that the clearance to 3,000 feet was directed to his aircraft, and contends that the incident in question resulted primarily from inaction on the part of ATC to insure that the clearance had been accepted solely by the Eastern flight for which it was intended. Respondent argues that he should, therefore, be exonerated from liability for the FAR violations alleged.

The Administrator has filed a reply brief, in which he urges the Board to affirm the initial decision.

Upon consideration of the briefs of the parties and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order in its entirety. We adopt the law judge's findings as our own.

³According to the evidence, said aircraft converged to a point where they were within approximately 700 feet of each other vertically and 2.15 miles of each other horizontally. See Exs. A-5, A-6. At the hearing, the air traffic controller responsible for the segment of airspace in which they were flying indicated that the standard separation in that airspace is a minimum of either 1,000 feet vertically or 3 miles horizontally. Tr. 54.

At the hearing, respondent offered the following explanation as to why his aircraft descended below 10,000 feet:

"I received what I believed to be a clearance for us, Continental 483, to descend, maintain 3,000 feet, cleared for the approach.

I read back in full readback acknowledging that clearance and then at that time, when I un-keyed my microphone, I heard no other instructions from . . . ATC or anything to lead me to believe that I shouldn't comply with that clearance."⁴

A transcript of the tower tape prepared by one of respondent's witnesses reflects the following communications:

| | | |
|---------|-------|---|
| 1647:58 | CO483 | CONTINENTAL FOUR EIGHTY THREE WITH YOU TO TEN |
| 1648:04 | ARR | CONTINENTAL FOUR EIGHTY THREE MIAMI APPROACH IDENT INFORMATION GOLF IS CURRENT EXPECT RUNWAY TWO SEVEN RIGHT |
| 1648:08 | CO483 | WE HAVE GOLF PLAN TWENTY SEVEN RIGHT |
| 1648:10 | ARR | ROGER |
| | * | * * * * * |
| 1650:16 | ARR | EASTERN FIFTY THREE AS YOU PASS A ONE NINETY HEADING TRAFFIC WILL BE TWELVE O'CLOCK FIVE MILES TURNING WESTBOUND AT FOUR THOUSAND A PAN AM LANDING ON TWO SEVEN LEFT |
| 1650:26 | EA53 | FIFTY THREE WE'RE LOOKING |
| | * | * * * * * |
| 1650:39 | ARR | . . . EASTERN FIFTY THREE IS SEVEN AND A HALF MILES FROM BASHO MAINTAIN THREE THOUSAND TO BASHO A HUNDRED AND SEVENTY KNOTS TO AGLAR CLEARED AN ILS RUNWAY TWO SEVEN RIGHT APPROACH APPROACHES ARE IN PROGRESS TO THE PARALLEL RUNWAY |
| 1650:48 | ? | [unintelligible to transcriber] |

⁴Tr. 110. Subsequently in his testimony, respondent reiterated that he had "read back the entire clearance." Id. 126.

1650:49 ? . . . 'EE'. . . CLEARED APPROACH. . .
[transcriber's best interpretation]

1650:50 EA53 EASTERN FIFTY THREE'S CLEARED THE
APPROACH

1650:52 ARR ROGER [transcriber's best
interpretation]

* * * * *

1651:58 ARR CONTINENTAL FOUR EIGHTY THREE
DESCEND AND MAINTAIN NINER THOUSAND

* * * * *

1652:05 CO483 TO NINER FOR FOUR EIGHTY THREE?

1652:06 ARR AH CORRECTION CONTINENTAL AH FOUR
EIGHTY WHAT ALTITUDE YOU
DESCENDING TO RIGHT NOW?

1652:10 CO483 WE WERE CLEARED APPROACH
ACKNOWLEDGED FOR THE CLEARANCE AND
WE WERE GOING TO THREE

1652:13 ARR CONTINENTAL FOUR EIGHTY YOU
MUST'A READ THE WRONG CLEARANCE BACK
TURN RIGHT HEADING TWO ONE ZERO AND
MAINTAIN EIGHT THOUSAND

1652:19 CO483 AHRIGHT TWO ONE ZERO WE'LL MAINTAIN
EIGHT."⁵

Also of record are "original" and "enhanced" copies of the tower tape.⁶ A review of both reveals that the controller's references to Eastern Flight 53 were all clear, and we do not, therefore, believe that respondent was warranted in thinking

⁵Ex. R-4. "ARR" denotes the Miami North Approach ATC station. At 1650:49, the transcriber noted "carrier shutoffs" after both the "EE" and "cleared approach" entries. He further indicated at the hearing that the "EE" entry represented what appeared to be the phonetic sound of the letter "e." Tr. 211.

⁶The "original" copy of the tower tape was introduced by the Administrator as Ex. A-7 and a rerecorded "enhanced" version of the tape was submitted by respondent as Ex. R-6. (A description of the enhancement process used is found at Tr. 213-17.) It is unclear as to which tape was used in the derivation of the above-quoted transcript.

that the clearance given at 1650:39 was for his aircraft.⁷ Instead, we are of the opinion that carelessness or inattention led respondent to mistake the clearance as having been directed to him.

The tapes also undermine respondent's assertion that ATC did not act properly to assure that the only flight accepting the clearance was Eastern 53. In this regard, the Board notes that, while the transcript contains the words "cleared approach," spoken at 1650:49 (which respondent has attributed to himself),⁸ those words are barely audible, and it is highly questionable as to whether they could have been identified or understood as such by the approach controller at the time of the incident. As the only distinct acknowledgment of the clearance came from Eastern

⁷While respondent has suggested that the controller's broadcast may not have been as clear to him in the cockpit as is reflected in the tapes due to "blockage" by the action of microphones from other aircraft "keying in on top" of the controller, there is no evidence tending to confirm that this occurred. Additionally, it appears that, had this happened, respondent would have either heard nothing or heard something too garbled to make out positively as "Continental 483," and should, therefore, have sought clarification from ATC before accepting the clearance. This is especially true in light of the fact that respondent was aware that a similarly-numbered flight (Delta 483) was operating in the area at the time. Tr. 108.

⁸Respondent professes that those words were a part of his acceptance and readback of the clearance, which he relates began at a pause between the controller's broadcast of "...runway two seven right approach" and "approaches are in progress to the parallel runway." Tr. 127, 138. While respondent characterized that break in the controller's transmission as a "big pause" (*id.*), which suggested to him that the broadcast of the clearance had been completed (*id.* 138), the tapes indicate that it was only about one second long. Thus, respondent's assumption as to the completion of the controller's clearance broadcast does not appear to have been justified.

Flight 53, we fail to see what further steps the controller should have taken to insure that no incorrect readbacks were made.

In view of the above, the Board believes respondent's reliance upon Administrator v. Holstein, NTSB Order EA-2782 (1988), is misplaced, for while the respondent there was exonerated for accepting an ATC clearance given to another aircraft, the facts of that case are readily distinguishable from those now before us. In Holstein, the respondent was piloting a Cessna aircraft whose call sign ("Cessna one zero echo"), was similar to that of a Cessna Citation ("Citation one zero eight") which was poised at the end of a runway for takeoff. The respondent's aircraft had been instructed to hold short of the same runway. After ATC instructed, "Citation one zero eight position and hold," followed by "Citation one zero eight cleared for takeoff," the respondent, who misunderstood that clearance as applying to him, broadcast "one zero echo rolling" and subsequently took off from the midpoint of the runway. The controller did not respond to that acknowledgment for more than 10 seconds, at which time it was too late to prevent the respondent's takeoff.

Key factors present in Holstein but absent here were a similarity of the aircraft's call signs, which provided a degree of reasonableness to the respondent's mistaken acceptance of a clearance, and a distinct acknowledgement of the ATC instruction by him, which put the controller on notice that something was

amiss. In the absence of such notice, a controller cannot be expected to take steps to clarify the situation,⁹ and the controller's failure to take such remedial action cannot, therefore, exonerate an airman for failing to follow ATC instructions.¹⁰

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 30-day suspension of respondent's ATP certificate shall begin 30 days from the date of this order.¹¹

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁹As noted above, the Board is of the view that, in this case, the approach controller reasonably believed that his instruction had been acknowledged solely by the aircraft for which it was intended.

¹⁰Additionally, in Holstein, the respondent was a private pilot, whereas, in this case, respondent holds an ATP certificate and is, therefore, held to the highest degree of care in the operation of his aircraft. See, e.g., Administrator v. Ferguson and Bastiani, 3 NTSB 3068, 3070 (1980), affirmed 678 F.2d 821 (9th Cir. 1982); Administrator v. Way, 3 NTSB 3683, 3687 (1981).

¹¹For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).